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No. 88-1714

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

KAREN MILLER,

Plaintiff-Petitioner,

v.

PUBLISHERS PAPER COMPANY, a Delaware corporation; ASSOCIATION OF WESTERN PULP AND PAPER WORKERS, LOCAL NO. 68; and ASSOCIATION OF WESTERN PULP AND PAPER WORKERS,

Defendants-Respondents.

PLAINTIFF-PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

		Page
Table of Authorities		ii
I.	The Circuit Court's Affirmation Of Judgment Against Plaintiff's Wrongful Discharge Claim Is Incorrect On All Grounds. . .	1
II.	The Circuit Court's Decision Granting Summary Judgment Against Plaintiff's Breach Of The Duty Of Fair Representation Claim Is In Conflict With Both This Court's And Other Circuit Court's Decisions. . .	7
III.	Conclusion	8

TABLE OF AUTHORITIES

Cases Cited	Page
Alexander v. Gardner-Denver, 415 US 36 (1974)	4
Allis-Chalmers v. Lueck, 471 US 202 (1985)	4
Embry v. Pacific Stationery and Printing Co., 62 OrApp 113, 659 P2d 426 (1983)	2, 3
Delaney v. Taco Time Int'l, 297 Or 10, 681 P2d 114 (1984)	6
Lingle v. Norge Division of Magic Chef, Inc., 486 US ___, 108 SCt 1877 (1988)	3
San Diego Building Trades v. Garmon, 359 US 236 (1959)	5, 6
Vaca v. Sipes, 386 US 171 (1967)	7, 8
Vaughn v. Pacific Northwest Bell Telephone Company, 289 Or 73, 611 P2d 281 (1980)	5

Statutes Cited	Page
29 USC § 185(a)	1, 3
National Labor Relations Act . . .	3, 5
ORS Chapter 652	6

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PLAINTIFF-PETITIONER'S REPLY BRIEF

I. The Circuit Court's Affirmation Of Judgment Against Plaintiff's Wrongful Discharge Claim Is Incorrect On All Grounds.

In its Brief in Opposition, Defendant-Respondent Publishers Paper Company (hereafter "Defendant Publishers") asserts that the Ninth Circuit's decision against Plaintiff's wrongful discharge claim was proper on two grounds besides Section 301

preemption. Defendant Publishers is incorrect.

First Defendant Publishers asserts that Plaintiff has not stated a claim for wrongful discharge under Oregon law, arguing that the Oregon Court of Appeals in Embry v. Pacific Stationery and Printing Co., 62 OrApp 113, 659 P2d 426 (1983), declined to extend the tort to cover employees subject to a collective bargaining agreement. Defendant Publishers misconstrues Embry. Embry was not decided on the basis of Oregon common law but rather on the basis of federal labor caselaw which existed at the time. The court in Embry essentially held that based on then-current federal caselaw the plaintiff's wrongful discharge claim was preempted by federal labor law. Embry, supra, 62 OrApp at 116-117. After Embry was decided this Court ruled that a

wrongful discharge claim which does not require an interpretation of a collective bargaining agreement for its resolution is not preempted by Section 301. Lingle v. Norge Division of Magic Chef, Inc., 486 US ___, 108 SCt 1877, 1885 (1988). Therefore, as Embry does not stand for the proposition Defendant Publishers attributes to it and in any event was decided on the basis of now-outdated federal labor caselaw, it does not support Defendant Publishers' argument that Plaintiff failed to state a claim for tortious wrongful discharge.

Defendant Publishers next argues that Plaintiff's wrongful discharge claim is preempted by the National Labor Relations Act (NLRA). Defendant Publishers is mistaken.

In fashioning the test for preemption under § 301 this Court in

Allis-Chalmers relied heavily on its decisions involving NLRA preemption, including Alexander v. Gardner-Denver Company, 415 US 36 (1974). Allis-Chalmers v. Lueck, 471 US 202, 213 (1985). In Alexander v. Gardner-Denver this Court said that it

> "found that the NLRA conferred rights 'on employees collectively to foster the process of bargaining,' id., at 51, 39 LEd2d 147, 94 SCt 1011, and distinguished such rights which could be waived by contract between the parties, on the one hand, from an individual's substantive rights derived from an independent body of law that could not be avoided by contractual agreement, on the other." Allis-Chalmers, supra, 471 US at 213, n. 8.

Plaintiff's wrongful discharge claim is based on the Oregon common law tort of wrongful discharge. As such it is derived from an independent body of law and cannot be waived by contractual agreement between

the parties. Therefore, it is not preempted by the NLRA.

Moreover, applying San Diego Building Trades v. Garmon, 359 US 236 (1959) to this case, as Defendant Publishers suggests should be done, leads to the conclusion that her wrongful discharge claim is not preempted. For as explained by the Oregon Supreme Court, this Court "has also stated that states do have power to regulate activity which is a 'peripheral concern' of the Labor Management Relations Act, or where the regulated conduct touches interest 'deeply rooted in local feeling and responsibility.'" Vaughn v. Pacific Northwest Bell Telephone Company, 289 Or 73, 82, 611 P2d 281 (1980) citing San Diego Building Trades Council v. Garmon, supra, 359 US at 243-244. Oregon has a deep interest in its workers receiving the compensation which they are

due as reflected by the statutes enacted to enable employees to obtain their compensation. ORS chapter 652. Oregon also has a vital concern in prohibiting an employer from discharging a worker in retaliation for the employee pursuing an important job-related right such as the right to receive one's compensation. Delaney v. Taco Time Int'l, 297 Or 10, 16, 681 P2d 114 (1984). Therefore, as Plaintiff's wrongful discharge claim for being terminated in retaliation for pursing her disability benefits concerns interests "deeply rooted in local feeling and responsibility", this claim is not preempted under Garmon.

II. The Circuit Court's Decision Granting Summary Judgment Against Plaintiff's Breach Of The Duty Of Fair Representation Claim Is In Conflict With Both This Court's And Other Circuit Courts' Decisions.

This Court explained in Vaca v. Sipes, 386 US 171, 190 (1967), that a union breaches its duty of fair representation owed towards a member when its conduct is arbitrary, discriminatory or in bad faith. Here there is evidence from which it could be concluded that Plaintiff was handicapped or was perceived as being a handicapped person. There is also evidence that the Union Defendants failed to warn Plaintiff of her employer's plan to terminate her if her doctors testified at her personal injury trial that she was permanently disabled. The evidence also shows that the Union Defendants failed to inform her in advance that the leadership would recommend to the union membership

that they vote to withdraw her grievance. This evidence permits the reasonable inference that the Union Defendants' conduct in this regard was motivated by discrimination against Plaintiff on the basis of a real or perceived physical handicap and therefore was violative of the standard set out in Vaca v. Sipes.

Plaintiff explained in her Petition how the circuit court's decision conflicted with that of other circuit courts.

III. Conclusion

Plaintiff's Petition for the issuance of a writ of certiorari should be granted.

Respectfully submitted,

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